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Supreme Court, U.S.
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In The

Supreme Court of the United States

RUSSELL SMITH,

Petitioner,

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

KENNETH M. CARPENTER
Counsel of Record
CARPENTER, CHARTERED
1525 S. Topeka Blvd.
P.O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Whether this Court's holding in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), that a Social Security claimant is not required to exhaust issues in a request for review in order to preserve judicial review of those issues, should also apply to the Court of Appeals for Veterans Claims.

Whether the jurisdiction of the Court of Appeals for the Federal Circuit pursuant to 38 U.S.C. § 7292 is limited to consideration of issues of statutory and regulatory interpretation which were previously presented to the Court of Appeals for Veterans Claims.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 214 F.2d 1331 (Fed. Cir. 1999), and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Smith v. West* is published as 12 Vet.App. 312 (1999) and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on June 13, 2000 and Rehearing En Banc was declined on August 16, 2000.

PROVISIONS INVOLVED

38 U.S.C. § 7292

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other

than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to the United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be –

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules of review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

STATEMENT OF THE CASE

Mr. Smith served on active duty in the U.S. Marine Corps from August 1946 to October 1946. Mr. Smith was discharged for honorable conditions due to enuresis. Mr. Smith then served in the U.S. Army from September 1950 to December 1951. Mr. Smith was again discharged under honorable conditions from the Army due to enuresis and related behavioral and psychiatric problems.

Mr. Smith applied to the Department of Veterans Affairs (the "agency") for service-connected psychiatric disabilities. Mr. Smith's claim was denied because the Agency determined that Mr. Smith's disabilities pre-existed service and were not aggravated by service. After another denial in 1993, Mr. Smith submitted additional

evidence in support of his claim. The Agency refused to reopen Mr. Smith's claim because it determined that he had failed to present new and material evidence to reopen the claim.

Mr. Smith appealed the Agency's determination to the Court of Appeals for Veteran Claims ("CAVC"), arguing that pursuant to 38 U.S.C. § 5108, the BVA failed to properly determine whether new and material evidence had been presented. In its April 7, 1999 opinion, the CAVC affirmed the BVA's April 1995 decision. The CAVC held that Mr. Smith had not submitted new evidence and therefore did not fulfill the requirement for new and material evidence necessary to reopen his claim for service connection for a psychiatric disorder.

Mr. Smith then appealed to the Federal Circuit arguing that the Agency failed to inform him what type of evidence constituted "new and material" evidence as provided in 38 U.S.C. § 5108. Mr. Smith argued that pursuant to 38 U.S.C. § 5103(a), the Agency was under a duty to inform a veteran prior to the denial of reopening a claim, of what evidence the Agency required in order to reopen the claim. Mr. Smith further argued that the Agency therefore deprived him of a property right to reopen a claim with new and material evidence without giving accord to the procedural due process afforded to such a right.

The Federal Circuit dismissed the appeal, holding that Mr. Smith had not raised the issue before the CAVC. The Federal Circuit reasoned that pursuant to 38 U.S.C. § 7292(a), it could only review issues relating to statutory interpretation that were relied upon by the CAVC in its

decision below. Thus, if an issue of interpretation is first raised before the Federal Circuit, it could not have been relied upon below. The Federal Circuit further held that it would not address a challenge to the constitutionality of a statute's interpretation unless it was raised below.

REASONS FOR GRANTING THE WRIT

In light of the Court's recent holding in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), this case provides the Court with an opportunity to resolve a conflict of law currently existing in the Federal Circuit regarding their jurisdiction to decide issues that were not explicitly raised before the CAVC below. In *Sims v. Apfel, supra*, this Court recognized the greater latitude accorded claimants in informal and nonadversarial proceedings. Specifically, the Court held that the judicially imposed requirement of issue exhaustion is inappropriate in the social security context because the parties have a nonadversarial relationship. "It is true that we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation. But the reasons we have done so does not apply here. The basis for a judicially imposed issue exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments raised before trial courts." *Sims v. Apfel*, 120 S.Ct. at 2084.

The Court thus reasoned that in a non-adversarial system, the issue-exhaustion requirement was not necessary. "More generally, we have observed that it is well settled that there are wide differences between administrative agencies and courts, and we have thus warned

against reflexively assimilating the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts." *Id.* at 2085.

Indeed, the import of this Court's holding and its application to the veterans adjudication system was recognized by the Federal Circuit in *Forshey v. Gober*, 2000 WL 1363714 (Fed. Cir.), *slip op.* at p. 3, wherein the court noted:

> [t]he Supreme Court's Sims rationale and articulation apply with equal, if not greater, force in this arena. The system for awarding veterans benefits is 'imbued with special beneficence' from a sovereign grateful to a 'special class of citizens, those who risked harm to serve and defend their country.' It is intended to be a 'nonadversarial, ex parte, paternalistic system,' that is 'uniquely pro-claimant.' It is, in short, or at least it ought to be, the antithesis of an adversarial formalistic dispute resolving apparatus. (Citations omitted).

Indeed, the Federal Circuit Panel in *Forshey* opined that while *Sims* involved court review of agency decisions and the Federal Circuit reviews Veterans Courts decisions, the distinction was of no consequence since the Veterans Court is not a fact finding body like a district court and "the administrative decision of the board, to the extent we are concerned passes through the Veterans Court as a matter of law." *Forshey, slip op.* at p. 7. Consequently, the *Forshey* court held that it did have jurisdiction to review an issue that was not raised below.

Thus, in light of *Smith v. West*, 214 F.3d 1331 (Fed. Cir. 2000), and *Forshey*, it is apparent that there is currently a

significant difference of opinion in the Federal Circuit as to its jurisdiction to review issues that were not raised below. Therefore, the Petitioner requests that the Supreme Court resolve this issue in the veterans' favor by determining that the same reasoning followed by the Court in *Sims v. Apfel* applies equally, if not more so, to the review of statutes and regulations veterans' benefits decisions by the Court of Appeals for the Federal Circuit.

The historical lack of judicial review of the veterans' benefits adjudications system and the uniqueness of the system are illustrative of why the doctrine of issue exhaustion should play no part in this special system. Until 1988, when Congress enacted the Veteran's Judicial Review Act, the Veteran Administration stood in "splendid isolation as the single federal administrative agency whose major functions were explicitly isolated from judicial review." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in*, 1988 U.S.C.C.A.N. 5782, 5791. When the 1988 Act was finally passed, the final legislation contained five crucial components: previous preclusion of judicial review of veteran benefit entitlements was repealed; the United States Court of Veterans Appeals (now called the Court of Appeals for Veteran Claims or "CAVC") was created; the Board of Veterans' Appeals (BVA) was retained as the final administrative decisional body with the Department of Veteran Affairs; a $10 attorney's fee cap was abolished; and most importantly for the issues discussed in this writ, an additional level of judicial review was created by allowing review of CAVC decisions by the Federal Circuit on certain narrow issues of law. *See*, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

The Federal Circuit has a vital role in judicial review of veteran claims. However, as a statistical matter, substantial appellate review for most cases ends at the CAVC. Since 1990, the CVA has disposed of over 10,000 cases. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998). In comparison, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *Id.* One reason for the relatively small number of cases decided by the Federal Circuit on the merits is due to the Federal Circuit's limited jurisdiction. CAVC factual determinations are insulated from Federal Circuit review unless the facts implicate constitutional questions. *See*, 38 U.S.C. § 7292(d)(2).

Beyond Federal Circuit review, dissatisfied parties may petition the Supreme Court for writ of certiorari. However, in the ten years that the CAVC has been in existence, the Supreme Court has granted only one certiorari petition, *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving large implications for the CAVC and Federal Circuit regarding the proper canons of construction for statutory and regulatory review. Thus, in all practicality to date, a veteran's last opportunity for judicial review of veteran benefits issues has been in the Federal Circuit. Such a practicality makes it quite clear that the Federal Circuit's role is essential to ensure the veteran's statutory right to judicial review of the statutes and regulations of the Department of Veterans Affairs.

From its creation, the Veterans Administration's statutes and regulations had not been subjected to consistent judicial scrutiny. In essence, the VA was successful in

avoiding consistent judicial review of the Agency's interpretations of their statutes and regulations and instead were able to rely upon their own interpretations. In 1988, Congress determined that the VA would no longer be insulated from judicial review and Congress expressly assigned the Court of Appeals for the Federal Circuit the responsibility for the interpretation of VA statutes and regulations, as well as constitutional claims. The Petitioner asserts that the doctrine of issue exhaustion is inappropriate in this non-adversarial arena. The Federal Circuit's jurisdiction should be interpreted to allow consideration of questions of law involving constitutional questions and issues of statutory and regulatory interpretation without those issues having necessarily been presented to the CAVC.

As such, when presented with any relevant issue of statutory interpretation, the Federal Circuit's jurisdiction should be implicated as contemplated by Congress. Declining judicial review of statutory interpretations based on an issue-exhaustion requirement does not serve this non-adversarial system, but instead serves to create an adversarial system that deprives a veteran of the judicial review provided for by Congress, because he failed to present the issue to the CAVC.

The sheer number of pro se claimants in the CAVC demonstrates why the doctrine of issue exhaustion is fundamentally inequitable. In 1999, 78% of the claimants appealing to the CAVC were pro se. (Fifth Judicial Conference, 12 Vet.App. XXVII, 1999). Thus, the majority of appellants before the CAVC are non-attorney litigants who are completely unaware of the issue exhaustion doctrine. Combined with the statutory limitation upon the

Federal Circuit's jurisdiction by Congress to issues of statutory and regulatory interpretations or a constitutional issue, a pro se appellant is effectively denied judicial review of a statutory or regulatory interpretation by the holding in *Smith* and *Belcher v. West,* 214 F.3d 1335 (Fed. Cir. 2000). There is no statutory requirement for the presentation of issues of statutory and regulatory interpretation to the CAVC as a predicate to trigger the Federal Circuit's jurisdiction. This is a "judicially created" doctrine which should not be applied in veterans' law or used to limit even further the jurisdiction of the Federal Circuit. Issues of statutory and regulatory interpretations or constitutional issues will not be raised before the CAVC by pro se appellants. As a consequence of the *Smith* and *Belcher* decisions, judicial review will not be afforded pro se appellants.

Lastly, the doctrine of issue exhaustion is also inherently unfair in the veteran's benefits adjudication system due to the developing state of law. Because judicial review has only been in existence since 1988, following the Agency's extended period of "splendid isolation" the case law has been constantly changing due to the Federal Circuit's interpretations of the Agency's statutes and regulations. This year alone, the Federal Circuit in precedential opinions has reversed and remanded ten cases, thereby creating new interpretations of statutes and regulations which had been relied upon for decades by the Agency to wrongfully deny veterans' claims. Such activity at the Federal Circuit indicates that the Agency's statutes are often misinterpreted. To deny a pro se veteran judicial review by the Federal Circuit because he failed to raise an interpretation of a statute or regulation

before the CAVC is inherently and fundamentally unfair. The doctrine of issue exhaustion may make sense in the "normal" civil adjudication process wherein the state of law has been well settled for many years and skilled advocates in "adversarial proceedings" know to "raise" issues to "preserve" such questions for appellate review. The role of the Federal Circuit as contemplated by Congress was to provide for a limited, but precise grant of jurisdiction to decide questions of law interpreting the Agency's statutes and regulations. It is antithetical to "limit" further the Federal Circuit's jurisdiction by the judicially created doctrine of "issue exhaustion." But such a doctrine is nonsensical in a legal arena where the state of law is still being created and subject to change.

Finally, this Court's holding in *Sims* is consistent with 38 U.S.C. § 7292 – the Federal Circuit's jurisdictional statute.

38 U.S.C. § 7292 provides, in relevant part:

> (a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide **any challenge** to the validity of any statute or regulation **or any interpretation thereof brought under this section,** and to interpret constitutional and statutory provisions, **to the extent presented and necessary to a decision.** The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.
>
> (d) The Court of Appeals for the Federal Circuit **shall decide all relevant questions of law,** including interpreting constitutional **and statutory provisions.**

(*Emphasis added*). In determining that it could not exercise jurisdiction over an issue of statutory interpretation not explicitly raised before and relied upon by the CAVC, the Federal Circuit in *Smith,* focused **only** on 38 U.S.C. § 7292(a) which provides that a party may obtain review of the decision with respect to a statutory interpretation relied upon by the CAVC. However, the Panel failed to acknowledge the other relevant provisions of 38 U.S.C. § 7292, and consequently misinterpreted its own jurisdiction.

The plain language of 38 U.S.C. § 7292(c) provides that the Federal Circuit **shall** have jurisdiction to decide **any** statutory interpretation to the extent presented and necessary to a decision. Further, 38 U.S.C. § 7292(d) provides that the Federal Circuit **shall** decide **all relevant questions of law.** Neither provision requires that the question of law or statutory provision was relied upon below by the CAVC.

The plain language of 38 U.S.C. § 7292 requires the Federal Circuit to exercise its jurisdiction over statutory interpretations even if such issues were not explicitly raised below to the CAVC. Even if there were some question as to whether one provision seems to allow for jurisdiction over statutory interpretations not relied upon by the CAVC below, and one provision disallowing jurisdiction over such issues, the statute must be interpreted in the veteran's favor for allowance of jurisdiction. Courts must "**ultimately**" read statutory provisions in a veteran's favor. *King v. St. Vincent's Hospital*, 502 U.S. 215, 220 – 221 (1991) (*emphasis added*). The canons of statutory construction of veteran benefits laws require that the provisions be construed in the beneficiaries' favor. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). *See, also, Brown v. Gardner*, 513 U.S. 115, 117-118 (1994).

Thus, if 38 U.S.C. § 7292 is construed in the veteran's favor, it must be interpreted to require Federal Circuit jurisdiction issues of statutory interpretation even if such issues were not raised below.

CONCLUSION

Because of the Federal Circuit's conflicting holdings in *Forshey* and *Smith, supra*, the question of law regarding the Federal Circuit's jurisdiction is clearly unsettled and a veteran has no way of knowing whether his appeal will be reviewed or dismissed. Thus, on the basis of this conflict of law, as well as the Court's recent holding in *Sims v. Apfel*, the Petitioner respectfully requests the

Court to instruct the Federal Circuit regarding its jurisdiction over issues of statutory interpretation that are not raised below. For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

KENNETH M. CARPENTER
CARPENTER, CHARTERED
1525 S. Topeka Boulevard
P. O. Box 2099
Topeka, KS 66601-2099
(785) 357-5251

Attorney for Petitioner,
Russell Smith

United States Court of Appeals
for the Federal Circuit

99-7133

RUSSELL E. SMITH

Claimant-Appellant,

v.

TOGO D. WEST, JR.,

Respondent-Appellee.

DECIDED: June 13, 2000

Before LOURIE, GAJARSA, and LINN, *Circuit Judges*.

PER CURIAM.

Russell E. Smith appeals from the decision of the Court of Appeals for Veterans Claims affirming the Board of Veterans' Appeals' denial of his request to reopen his claim for service-connected disability benefits. *See Smith v. West*, No. 95-638 (CAVC Apr. 7, 1999). Because Smith does not raise an issue with respect to the validity of any statute or regulation or any interpretation thereof that was relied on by the Court of Appeals for Veterans Claims, we dismiss for lack of jurisdiction.

BACKGROUND

Smith is a veteran of both the United States Marines and the United States Army, having served in the Marines for three months in 1946 and in the Army for fifteen months from 1950 to 1951. *See id.*, slip op. at 1-2. He was

honorably discharged from both the Marines and the Army due to unsuitability for service because of enuresis and related behavioral and psychiatric problems. *See id.* Smith has applied to the Department of Veterans Affairs ("the agency") for disability benefits several times. *See id.* at 2-3. Each of his applications was denied because the agency found that his psychiatric conditions pre-existed, and were not aggravated by, his service. *See id.* Following the denial of an application in 1993, Smith submitted more evidence in support of his disability claim. *See id.* at 3. The Board found it cumulative of record evidence it had previously considered, and thus not new and material evidence that his disabilities were incurred or aggravated during service. *See id.* Smith appealed this finding to the Court of Appeals for Veterans Claims, which affirmed, holding that the Board did not clearly err in finding the newly submitted evidence cumulative. *See id.* at 4-5. Smith timely appealed to this court in accordance with 38 U.S.C. § 7292 (1994).

DISCUSSION

Our jurisdiction to review a judgment of the Court of Appeals for Veterans Claims, set forth in 38 U.S.C. § 7292, is highly circumscribed. *See Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999). "[A]ny party . . . may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court [of Appeals for Veterans Claims] in making the decision." *See* 38 U.S.C. § 7292(a) (1994). We must decide "all relevant questions of law,

including interpreting constitutional and statutory provisions," and

> hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for the Veterans Claims that [we] find to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
> >
> > (D) without observance of procedure required by law.

Id. § 7292(d)(1). However, "[e]xcept to the extent that an appeal . . . presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

The only issues raised on appeal are whether the agency misconstrued 38 U.S.C. § 5103(a) (1994), and whether it thereby violated Smith's right to due process, by failing to inform Smith as to what would constitute "new and material evidence" of service connection. Smith argues that "the Agency has a duty to inform the veteran, prior to the denial of the claim, of what evidence the Agency has been unable to collect or develop in order to

support an award of benefits." App. Br. at 9. Smith further argues that "the Agency deprived [him of] his property right to submit a claim for reopening with new and material evidence without giving accord to the procedural due process afforded to such a right." *Id.* at 16.

The agency responds that Smith is precluded from raising a challenge to the interpretation or application of section 5103(a) or a due process challenge because he did not raise those issues in any of the proceedings below. It further argues that, were we to reach the merits of Smith's statutory interpretation argument, under *McKnight v. Gober*, 131 F.3d 1483 (Fed. Cir. 1997), the agency "does not have an absolute duty pursuant to 38 U.S.C. § 5103(a) to inform claimants, whenever they submit a claim to reopen, as to what evidence constitutes new and material evidence sufficient to support a reopening of a claim." Resp. Br. at 17.

We agree with the agency that the statutory interpretation issue in this appeal is not properly before us. 38 U.S.C. § 7292(a) provides that "any party . . . may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . *that was relied on by the Court* [of Appeals for Veterans Claims] in making its decision." (emphasis added). Compliance with the jurisdictional statute requires that the issue raised on appeal be one of validity or interpretation that the veterans court expressly decided or impliedly addressed. Thus, our jurisdiction of an appeal requires that the issue raised relate to the validity of a statute or regulation, or an interpretation thereof, *and* that it have been relied on by the veterans court in its decision. If an issue of interpretation is first

raised on appeal here, it cannot have been relied on below, unless the court itself raised it and relied on it *sua sponte*. The "relied on" language ordinarily means that the issue of validity or interpretation was a part of the court's decision as indicated by its written opinion. Of course, we have held that avoidance of an issue by the veterans court, when that issue was raised below, does not deprive an appellant of the right to raise that issue again here. *See Linville v. West*, 165 F.3d 1382, 1384 (Fed. Cir. 1999).

This holding is consistent with our earlier decision in *Boggs v. West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999), where we stated that "[t]he Court of Appeals for Veterans Claims did not rely on the interpretation of law that is now raised on appeal. Thus Boggs has no statutory right of appeal on an issue that was not raised and relied on below." The rule we reaffirm here, in addition to being statutorily based, has the salutory effect of avoiding surprise. As we further stated in *Boggs*, "[t]his rule ensures that 'parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' " *Boggs*, 188 F.3d at 1338 (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). In addition, we benefit from the thinking of the Court of Appeals for Veterans Claims on issues with which it is thoroughly familiar. The time to set the parameters of a case is before it comes to this court. An appellant who has not settled on an appealable issue until he or she has arrived at this court has thus missed the train.

In this case, like *Boggs*, the only issue presented to the Court of Appeals for Veterans Claims was the factual issue concerning whether the veteran presented new and material evidence of service connection. *See id.* at 1337. Like the statutory interpretation issue presented in *Boggs*, the statutory interpretation issue presented in this case was never raised or addressed in the Court of Appeals for Veterans Claims and we therefore cannot address it here. *See id.* Having represented Mr. Boggs in that case, Smith's counsel is well aware of this rule. *Boggs* has been followed by other cases affirming its holding as the rule in this court. *See Bradley v. West*, No. 99-7200, 2000 WL 274285 (Fed. Cir. Mar. 13, 2000); *Wright v. DVA*, No. 98-3328, 1999 WL 1212017 (Fed. Cir. Dec. 15, 1999); *Siewart v. West*, No. 99-7053, 1999 WL 969891 (Fed. Cir. Dec. 8, 1999) (nonprecedential cases). The only distinction we would make over *Boggs* is the technical one of dismissing the appeal, rather than affirming, as we did in *Boggs*.

The constitutional argument that Smith raises here also was not raised below. In the absence of a timely challenge to the constitutionality of a statute or regulation, or its interpretation, we similarly have no jurisdiction. *Cf. In re Bailey*, 182 F.3d 860, 865 (Fed. Cir. 1999) (holding that we have jurisdiction to review a "free-standing" constitutional issue not involving a challenge to the interpretation or validity of a statute or regulation).

In addition to asking this court to adjudicate issues not raised below, Smith presents the same statutory interpretation arguments raised and rejected in *McKnight*. Even though *McKnight* is the leading case on this issue, it was not cited in Smith's opening brief or distinguished in

his reply brief. Arguing for the first time on appeal a position already decided by this court, without even citing that prior precedent, runs dangerously close to bringing a frivolous appeal.

Section 5103(a) states that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." 38 U.S.C. § 5103 (1994). In *McKnight* we explicitly rejected the precise argument raised here, that section 5103(a) requires the agency to notify the veteran, in all circumstances, what he needs by way of further evidentiary support in order to reopen his claim. We held that section 5103 does *not* impose an absolute obligation on the agency to notify the veteran what evidence would be required to reopen a claim. *See McKnight*, 131 F.3d at 1485. Rather, we interpreted section 5103(a) as imposing an obligation to notify the veteran of factual evidence needed when the circumstances of the case "put [it] 'on notice that relevant evidence may have existed, or could have been obtained, that if true, would have made the claim "plausible" and that such evidence had not been submitted with the application.' " *Id.* at 1485 (quoting *Robinette v. Brown*, 8 Vet.App. 69, 80 (1995)). In other words, we held that the agency is required to notify the veteran "when the circumstances reasonably suggest that such additional relevant evidence may be found elsewhere." *Id.* "[N]othing in the statute suggest[s] that Congress intended the Department to notify veterans of the particular evidence needed to make their applications complete where the Department could not reasonably have had notice of the existence of such evidence." *Id.* It

therefore also follows that since there is no absolute duty to notify, there can be no *per se* violation of due process for failure to give such notice.

CONCLUSION

As in *Boggs*, Smith has raised issues not presented or addressed below and we therefore cannot address them. The appeal is therefore

DISMISSED.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 95-638

RUSSELL E. SMITH, APPELLANT,

V.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided Apr. 7, 1999)

Gary L. Beaver was on the pleadings for the appellant.

Robert E. Coy, Acting General Counsel; *Ron Garvin*, Assistant General Counsel; *Michael A. Leonard*, Deputy Assistant General Counsel; and *Michele Russell Katina* were on the pleadings for the appellee.

Before KRAMER, FARLEY, and IVERS, *Judges*.

IVERS, *Judge:* The veteran, Russell E. Smith, appeals an April 14, 1995, decision of the Board of Veterans' Appeals (BVA or Board) which determined that no new and material evidence had been submitted to reopen a claim for service connection for a psychiatric disorder. This appeal is timely and the Court has jurisdiction over the case pursuant to 38 U.S.C. § 7252(a). For the reasons set forth below, the Court will affirm the Board's April 1995 decision.

I. FACTS

The veteran served in the U.S. Marine Corps from August 1946 to October 1946. Record (R.) at 168. He was discharged under honorable conditions due to

unsuitability for service because of enuresis (bed wetting). R. at 60-61. The enuresis was noted as having preexisted service and having not been aggravated in service. *Id.* A 1948 rating decision denied service connection for enuresis. R. at 176.

The veteran then served in the U.S. Army from September 1950 to December 1951. R. at 167. His discharge from the Army was also due to unsuitability, and followed a recommendation of discharge by a medical officer who diagnosed enuresis and immaturity with symptomatic habit reaction. R. at 167, 123.

In the years following his separation from service, the veteran pursued claims for VA benefits that are unrelated to the claim that is the subject of this appeal. The first indication in the record of a claim for service connection for a psychiatric disability is in the transcript from a VA regional office hearing held in October 1986. At that hearing, the veteran testified that, in 1946, he had been discharged from service in the Marines for bed wetting and nervousness. R. at 283. His representative stated that the veteran contended that his nervous condition was aggravated by service. R. at 287. A December 1986 rating decision found that the veteran's claim for service connection for nervousness was not supported by the evidence. R. at 302.

In March 1988, a private psychiatrist referred the veteran to a psychologist for evaluation. R. at 328. The evaluation report noted that the veteran had stated that his discharge from the Army in 1951 was "for psychiatric reasons, including bed wetting," and that he repeatedly denied having had those problems. *Id.* The evaluation

concluded that the veteran currently had "significant psychopathology" but did not link it to his military service. R. at 331.

A May 1988 rating decision and a March 1990 hearing officer's decision determined that no new and material evidence had been submitted to reopen the veteran's claim for service connection for a psychiatric disability. R. at 337, 365-66. The veteran appealed the March 1990 decision, and the BVA remanded the case to the RO in June 1991 for "full[ ] develop[ment] [of] the veteran's claim for service connection for a psychiatric disorder." R. at 373, 387-88, 402-03.

The veteran had two separate VA psychiatric examinations in August 1991. R. at 412-18. One psychiatrist stated his impression of the veteran's condition as "dependent personality disorder with some elements of schizoid personality disorder," but added that the impression was not definite, and "recommend[ed] strongly" that the veteran be hospitalized for observation. R. at 415. The second psychiatrist diagnosed "[s]chizoid personality disorder." R. at 418. Upon receipt of this information, the BVA again remanded the case with instructions that the veteran be hospitalized for observation "to permit the psychiatric examiners who examined him in August 1991 to complete their reports and diagnosis(es)." R. at 442.

The psychiatrists again examined the veteran during a VA hospitalization in July 1992. R. at 465-70. One psychiatrist referred the veteran for a psychological evaluation which was completed that same month. R. at 471-76. The psychiatrists concurred in diagnoses of dependent

personality disorder with schizoid traits and post-traumatic stress disorder, with the stressor having occurred when the veteran was 12 years old. R. at 466, 470. The evaluating psychologist recommended reevaluation in one to three months "to determine the stability of [the veteran's] cognitive performance." R. at 476.

In a January 1993 decision, the BVA denied the veteran's claim for service connection for a psychiatric disorder. R. at 501-05, 507-09. The Board concluded that the veteran's diagnosed disorder "was not manifested during service, and the stressor causing [PTSD], diagnosed decades after service, occurred prior to service."

Following the January 1993 BVA decision, the veteran's representative submitted an October 1992 VA psychological evaluation report. R. at 512-18. The report contained a diagnosis of PTSD from childhood, noted dependent and schizoid personality traits, and indicated moderate stress. R. at 516. In the decision presently on appeal, the BVA found that the report was cumulative of information that was before the Board at the time of the January 1993 decision and thus, not new, and that it was not material because it was not probative of whether a psychiatric disorder was incurred in or aggravated during service. R. at 10. The Board concluded that "no new and material evidence ha[d] been presented to reopen a claim for service connection for a psychiatric disorder." R. at 8.

II. ANALYSIS

A claim that is disallowed by the Board may not be reopened and allowed, and a claim based on the same

factual basis may not be considered, unless new and material evidence with respect to the claim is presented or secured. 38 U.S.C. §§ 7104(b) and 5108; *see Barnett v. Brown*, 83 F.3d 1380 (Fed. Cir. 1996). In order for evidence to be sufficient to reopen a previously disallowed claim, it must be *both* new *and* material. If evidence is not new, the inquiry ends and the claim cannot be reopened.

By regulation, VA sets forth several criteria that must be met for evidence to be new and material. 38 C.F.R. § 3.156(a). Regarding newness, the regulation requires that the newly submitted evidence cannot have been previously submitted to agency decisionmakers and that it cannot be either cumulative or redundant. *Id.* Echoing these requirements, this Court has defined "new evidence" as evidence which (1) was not in the record at the time of the final disallowance of the claim, and (2) is not "merely cumulative" of other evidence in the record. *Evans v. Brown*, 9 Vet.App. 273, 283 (1996); *see also Elkins v. West*, ___ Vet.App. ___, ___, No. 97-1534, slip. op. at 10-11 (Feb. 17, 1999).

The Court generally reviews new-and-material-evidence determinations under the deferential "clearly erroneous" standard of review. *Elkins*, ___ *Vet.App.* at ___, slip op. at 13. Under the "clearly erroneous" standard, "if there is a 'plausible' basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Evidence to be considered in a new and material evidence review includes all evidence submitted "since the time that the claim was finally disallowed on any basis, not only since the time that the claim

was last disallowed on the merits." *Evans*, 9 Vet.App. at 285.

In the present case, the last final disallowance of the veteran's claim for service connection for a psychiatric condition was a January 1993 BVA decision. The only evidence submitted after that disallowance was an October 1992 psychological evaluation report. The BVA found that the report was not new evidence because it was merely cumulative of evidence that was in the record at the time of the 1993 BVA decision. R. at 10.

Initially, the Court notes previous case law that established that non-record evidence that was not in the case file but was within the Secretary's control (such as VA records), and that predated a BVA decision and could reasonably have been expected to be part of the record, was therefore constructively " 'before the Secretary and the Board' when the BVA decision was made." *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (per curiam order) (citing 38 U.S.C. § 7252(b)). In *Bell*, unlike in the present case, the appellant had sought, on appeal to this Court, to include evidence in the record that had not been in the record before the Board. *Id.* at 612. The Court found that the appellant's evidence might have been factually determinative of the appellant's claim, that a remand was in order when such evidence was not in the record, and that it was necessary for items considered by the Board to be included in the record on appeal. *Id.* at 612-13.

Whether the evidence in question was constructively before the Board in January 1993 is not at issue because that is not the decision presently pending on appeal. Rather, the evidence in question *was* in the record before

the Board prior to its April 1995 decision, the decision now under scrutiny, and was, in fact, the express object of that decision.

Based on this distinction, the Court will assume that evidence constructively before the Board in 1993 could still be new evidence for purposes of its 1995 decision. Nevertheless, such is not the case here where there is a plausible basis in the record for the Board's finding that the veteran's newly submitted evidence was merely cumulative of other evidence that was previously in the record. *See Elkins* and *Gilbert*, both *supra*. The October 1992 report reaches the same diagnostic conclusion regarding PTSD that was reached in July 1992 psychiatric reports which were in the record prior to the January 1993 BVA decision. R. at 516, 466, 470. The report notes dependent and schizoid personality traits and moderate stress, conditions that were diagnosed in the July 1992 psychiatric and psychological evaluation reports. R. at 516, 466, 470, 475. The Board's factual determination that the October 1992 report was not new evidence was not clearly erroneous.

The essence of the Board's April 1995 decision that the evidence submitted since the last final disallowance of the veteran's claim was not new and material was that the evidence was not new because it was cumulative of evidence already of record. The reasons and bases given by the Board included a statement that the evidence was not material based on lack of probativeness, but this finding was not necessary to the determination that the evidence was not new. Once it was determined that the evidence was not new, no further analysis was required, for it could not be "new *and* material" if it was not "new."

The veteran has argued in this appeal that the Secretary never applied the presumption of aggravation in considering his claim regarding his diagnosed PTSD, and that the presumption is new and material evidence "in the context of Mr. Smith's attempt to have his claim for service connection reopened." Appellant's Brief at 29, 21-37. The United States Court of Appeals for the Federal Circuit, in affirming a decision of this Court, has held that the "failure to apply[ ] a statutory or regulatory burden-shifting presumption does not constitute 'new and material evidence' for the purpose of reopening a claim under 38 U.S.C. § 5108." *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998), *cert. denied*, 67 USLW 3152 (U.S. Nov. 2, 1998) (No. 98-197). With respect to an argument in *Routen* that the presumption was never applied, the Federal Circuit stated, "[U]nless Mr. *Routen* is able to reopen his claim by showing clear and unmistakable error, or by presenting new and material evidence, the issue of whether or not the presumption of aggravation applies cannot be addressed." *Id.* at 1443. Pursuant to *Routen*, the veteran's argument that the presumption of aggravation is new and material evidence is without merit.

III. CONCLUSION

Upon consideration of the record and the pleadings, the Court holds that the veteran has not submitted new evidence and therefore has not fulfilled the requirement for new and material evidence to reopen his claim for service connection for a psychiatric disorder. The Court is satisfied that the BVA decision that is the subject of this appeal meets the "reasons or bases" requirements of 38

U.S.C. § 7104(d)(1). Accordingly, the April 14, 1995, decision of the BVA is AFFIRMED.

United States Court of Appeals
for the Federal Circuit

99-7133

RUSSELL E. SMITH,

Claimant-Appellant,

v.

HERSHEL W. GOBER, Acting Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

(Filed Aug. 16, 2000)

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 23, 2000.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: August 16, 2000

cc: Kenneth M. Carpenter
Kent G. Huntington

SMITH V DVA, 99-7133
(CVA – 95-638)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

Supreme Court, U.S.
FILED
JAN 8 2001
OFFICE OF THE CLERK

(2) (2)

Nos. 00-739 and 00-754

In the Supreme Court of the United States

ROBERT S. BELCHER, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

RUSSELL E. SMITH, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
MARTIN F. HOCKEY, JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTION PRESENTED

Whether, under 38 U.S.C. 7292, the United States Court of Appeals for the Federal Circuit has jurisdiction over an appeal from the denial of a claim for veterans' benefits when the claimant's appeal is based on statutes and regulations that were not presented to, or relied upon by, the Court of Appeals for Veterans Claims.

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In the Supreme Court of the United States

No. 00-739

ROBERT S. BELCHER, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

No. 00-754

RUSSELL E. SMITH, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 00-739 (00-739 Pet. App. 1-7) is reported at 214 F.3d 1335, and its opinion in No. 00-754 (00-754 Pet. App. 1-8) is reported at 214 F.3d 1331. The opinion of the Court of Appeals for Veterans Affairs in No. 00-739 (00-739 Pet. App. 8-

19) is unreported, and its opinion in No. 00-754 (00-754 Pet. App. 9-17) is reported at 12 Vet. App. 312.

JURISDICTION

The judgment of the court of appeals in No. 00-739 was entered on June 16, 2000. The petition for rehearing was denied on August 21, 2000. The judgment of the court of appeals in No. 00-754 was entered on June 13, 2000. The petition for rehearing was denied on August 16, 2000. The petitions for a writ of certiorari in both No. 00-739 and No. 00-754 were filed on November 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7292(a) provides that "[a]fter a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation * * * or any interpretation thereof * * * that was relied on by the Court in making the decision." 38 U.S.C. 7292(a) (1994 & Supp. IV 1998). This review is available only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(c). The Federal Circuit held that Section 7292(a) did not authorize jurisdiction over the appeal of petitioner in No. 00-739 or the appeal of petitioner in No. 00-754 because the petitioners' arguments invoked statutes and regulations that were neither raised before the United States Court of Veterans Appeals (Veterans Court) nor relied on by the Veterans Court in reaching its decisions. 00-739 Pet. App. 7; 00-754 Pet. App. 8. Because the two petitions present the same question regarding the Federal Circuit's application of 38 U.S.C. 7292(a), the government consolidates its response to the two petitions.

2. a. Robert Belcher, petitioner in No. 00-739, served in the United States Navy from July 1943 to April 1944. 00-739 Pet. App. 1. In 1996, the Board of Veterans Appeals (BVA) denied Belcher's claim for benefits based on an alleged psychiatric disability, finding that the psychiatric condition predated Belcher's military service and was not aggravated by that service. *Id.* at 13. Belcher appealed that decision and the Veterans Court affirmed, holding that the Secretary of Veterans Affairs (VA) established by "clear and unmistakable evidence" that the psychiatric condition predated service and was not aggravated by service. *Id.* at 15-16.

b. Belcher then appealed to the Federal Circuit, arguing that the Veterans Court decision violated 38 C.F.R. 3.304(b)(3), which provides that "[s]igned statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest [are] of no force and effect if other data do not establish the fact." Belcher contended that this regulation also prohibited the Veterans Court from considering 1944 "medical evaluations and diagnoses, where the conclusions of such examinations are based even upon *oral* statements by the veteran 'relating to the origin, or incurrence of any disease or injury.'" 00-739 Pet. App. 3 (emphasis in original). At oral argument, counsel for Belcher admitted that the Section 3.304(b)(3) argument had not been presented to the Veterans Court. *Id.* at 4.

The Federal Circuit noted that its jurisdiction is limited to a review of Veterans Court decisions "with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . *that was relied on by the Court in making the decision.*" 00-739 Pet. App. 4 (quoting 38 U.S.C. 7292(a) (1994 & Supp. IV 1998)).

The court cited its decision a few days earlier in *Smith* v. *West*, 214 F.3d 1331 (Fed. Cir. 2000) (the decision in No. 00-754 discussed *infra*), in explaining that "where the Court of Appeals for Veterans Claims neither addresses a legal issue nor has such an issue presented to it, that court cannot be said to have 'relied on' this issue or argument 'in making its decision," 00-739 Pet. App. 4-5 (quoting 38 U.S.C. 7292(a) (1994 & Supp. IV 1998)) (citing *Smith* v. *West*, 214 F.3d 1331 (Fed. Cir. 2000); *Linville* v. *West*, 165 F.3d 1382, 1384-1385 (Fed. Cir. 1999)). Therefore, because "Mr. Belcher's 38 C.F.R. § 3.304(b)(3) issue was not addressed by or presented to the Court of Appeals for Veterans Claims," the Federal Circuit held that it was "without jurisdiction to consider it." 00-739 Pet. App. 5.

The Federal Circuit explained that this Court's recent decision in *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000), which rejected a judicially-crafted issue exhaustion requirement in appeals of Social Security administrative decisions, did not affect the application of 38 U.S.C. 7292 (1994 & Supp. IV 1998). 00-739 Pet. App. 5. The Federal Circuit noted that *Sims* made clear that it did not cast doubt on statutory issue exhaustion and "38 U.S.C. § 7292(a) speaks directly to the requirement of issue exhaustion." *Ibid.* The Federal Circuit further distinguished *Sims*, noting that "*Sims* deals with review of an agency decision by a court, as opposed to this case, which considers our review of another court's judgment." *Ibid.* (citing 38 U.S.C. 7251 (1994 & Supp. IV 1998)).

3. a. Russell Smith, petitioner in No. 00-754, served in the Marine Corps for three months in 1946 and the Army for fifteen months in 1950 and 1951. Smith appealed a decision of the BVA that denied his most recent request for service-connected disability benefits.

00-754 Pet. App. 1-2. The BVA concluded that petitioner failed to provide new and material evidence in support of his attempt to reopen earlier proceedings. *Id.* at 9. The Veterans Court affirmed the BVA, holding that the BVA did not clearly err in finding the newly submitted evidence merely cumulative. *Id.* at 16.

b. In his appeal to the Federal Circuit, Smith argued that the VA misconstrued 38 U.S.C. 5103(a), which provides that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." Smith contended that this provision required the VA to inform him "as to what would constitute 'new and material evidence'" and the failure to do so violated Smith's due process rights. 00-754 Pet. App. 3. This argument, however, was "never raised nor addressed in the Court of Appeals for Veteran Claims." *Id.* at 6.

The Federal Circuit noted that its jurisdiction to hear appeals from the Veterans Court is "highly circumscribed" under 38 U.S.C. 7292. 00-754 Pet. App. 2. "Compliance with the jurisdictional statute requires that the issue raised on appeal be one of validity or interpretation that the veterans court expressly or impliedly addressed." *Id.* at 4. Thus, as the Federal Circuit had explained previously in *Boggs* v. *West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999), a claimant has "no statutory right of appeal over an issue" that was neither raised nor addressed below. 00-754 Pet. App. 5. Accordingly, the court dismissed Smith's appeal for lack of jurisdiction.[1] *Id.* at 8.

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[1] The court added that Smith's statutory argument was directly "raised and rejected" in *McKnight* v. *Gober*, 131 F.3d 1483

ARGUMENT

The Federal Circuit's decisions are correct and do not conflict with any decision of this Court. Moreover, any tension between these decisions and another decision of the Federal Circuit should be addressed by the Federal Circuit *en banc*, where a petition for *en banc* review filed by the government in that other case is now pending. Review by this court is unwarranted.

1. The Federal Circuit has limited jurisdiction to review decisions of the Veterans Court. As petitioners note, until 1988 there was no judicial review of VA benefits decisions. See 00-739 Pet. 8; 00-754 Pet. 8. The Veteran's Judicial Review Act of 1988 created the United States Court of Veterans Appeals, *ibid.*, and in 38 U.S.C. 7292 authorized a further, "highly circumscribed" layer of judicial review in the Federal Circuit. 00-754 Pet. App. 2. Under Section 7292(a), the Federal Circuit may review Veterans Court decisions only "with respect to the validity of any statute or regulation * * * or any interpretation thereof (other than a determination as to a factual matter) that was *relied on* by the [Veterans] Court in making the decision." 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) (emphasis added). Thus, there is no Federal Circuit review of factual issues or the application of the law to the facts. And the Federal Circuit's review of legal issues is expressly limited to challenges to the validity or interpretation of statutes and regulations that the Veterans Court relied on in making its decision. Section 7292(d) repeats this clear jurisdictional limitation: The Federal Circuit "shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determina-

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(Fed. Cir. 1997), and thus Smith's appeal ran "dangerously close to bringing a frivolous appeal." 00-754 Pet. App. 6-7.

tion as to a factual matter) *that was relied upon in the decision of the Court of Veterans Appeals*." 38 U.S.C. 7292(d) (1994 & Supp. IV 1998) (emphasis added). Thus, in dismissing petitioners' appeals, the Federal Circuit followed Congress's unambiguous intent that the court had jurisdiction to review only those statutes and regulations that the Veterans Court relied on below.

Petitioners do not dispute the fact that the Veterans Court did not rely on the statutes and regulations that formed the basis for petitioners' later appeals to the Federal Circuit. Nor do petitioners contest the Federal Circuit's reading of Section 7292(a)'s plain language. Instead, petitioners argue that other subsections of 38 U.S.C. 7292 expand the Federal Circuit's jurisdiction beyond that provided in Section 7292(a). 00-739 Pet. 13-14; 00-754 Pet. 13-14.[2]

Petitioners' argument ignores the plain language and the structure of 38 U.S.C. 7292. Petitioners highlight the inclusion of the word "any" in Section 7292(c). 00-739 Pet. 13-14; 00-754 Pet. 13-14. But Section 7292(c) is

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[2] This interpretation was not offered before the Federal Circuit, even though petitioner Smith had notice of the Secretary's jurisdictional challenge. See 00-754 Pet. App. 4. The Supreme Court too follows the traditional appellate requirement of issue exhaustion that Congress codified with respect to the Federal Circuit's review of Veterans Court decisions in 38 U.S.C. 7292: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Thus, absent any special circumstances, petitioners' interpretation of 38 U.S.C. 7292 is not properly before the Court with respect to the petition in No. 00-754.

In Belcher's case, the Federal Circuit raised the jurisdictional issue *sua sponte*, so it is less certain that the Supreme Court's issue exhaustion requirement is implicated.

the provision providing exclusive jurisdiction in the Federal Circuit, as opposed to other courts of appeals, over appeals from decisions of the Veterans Court. The expansive language ensures that *any* appeal authorized under Section 7292(a) is brought in the Federal Circuit. Section 7292(c) makes this quite clear: it states that the Federal Circuit has exclusive jurisdiction over any challenge "*brought under this section*," thus referencing the right of review that Section 7292(a) grants. 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) (emphasis added). Section 7292(c) does not provide a party with additional statutory rights of review.

Petitioners also cite language in Section 7292(d) directing that the Federal Circuit "shall decide all relevant questions of law" (00-739 Pet. 13; 00-754 Pet. 13), but omit the following sentence that reinforces Section 7292(a)'s limitation of the Federal Circuit's authority to review of statutes and regulations that were "relied upon in the decision of the Court of Veterans Appeals." 00-739 Pet. 13; 00-754 Pet. 13. 38 U.S.C. 7292(d) (1994 & Supp. IV 1998). Thus, the provisions cited by petitioners actually confirm that Section 7292(a), the only provision granting a party a right of review, limits that review to statutes and regulations that the Veterans Court relied on below. 38 U.S.C. 7292(a) (1994 & Supp. IV 1998).

2. This Court's decision in *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000), upon which petitioners rely (00-739 Pet. 8; 00-754 Pet. 8), provides no support for their position for two reasons.

First, the exhaustion requirement rejected by *Sims* was judicially created, whereas the exhaustion requirement at issue here is created by statute. In *Sims*, the Court expressly distinguished issue exhaustion requirements created by statute or regulation, 120 S. Ct. at

2084, and recognized that such requirements are likely valid. *Ibid.* The Court cited a number of its prior decisions, as well as court of appeals decisions, enforcing statutory or regulatory issue exhaustion requirements for review of NLRB proceedings, see *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), Federal Power Commission proceedings, see *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498 (1955), and Federal Communications Commission proceedings, see *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & n.6 (D.C. Cir. 1983). 120 S. Ct. at 2084 (also citing *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 n.6 (1952)). The *Sims* Court thus emphasized that its treatment of the judicially created issue exhaustion requirement for review of Social Security proceedings in no way affected the statutory issue exhaustion at issue in those cases. Nor does *Sims* affect the statutory issue exhaustion requirement in 38 U.S.C. 7292.

Second, as the court of appeals noted in *Belcher* (00-739 Pet. App. 5), *Sims* rejected an issue exhaustion requirement that would have required the claimant to exhaust issues in a nonadversarial administrative proceeding, whereas the instant cases concern a requirement that parties exhaust issues in a court. *Sims* noted that the rationale for requiring issue exhaustion is weakest in reviewing a nonadversarial administrative proceeding, stronger in reviewing an adversarial administrative proceeding, and strongest in reviewing a court decision. 120 S. Ct. at 2085. Thus, the reasoning that led the Court to reject the issue exhaustion requirement in *Sims* would lead to precisely the opposite result here, where the proceeding under review is a proceeding of the Veterans Court, which is a court of record following formal judicial procedures and where

the parties can be represented by counsel. See 38 U.S.C. 7251 (1994 & Supp. IV 1998) ("There is hereby established * * * a court of record to be known as the United States Court of Appeals of Veterans Appeals."); 38 U.S.C. 7261 (1994 & Supp. IV 1998) (setting forth the scope of review for the Veterans Court); 38 U.S.C. 7263 (1994 & Supp. IV 1998) (allowing legal representation and not binding claimants to the unpaid representation requirements applicable in administrative veterans benefit proceedings); 38 U.S.C. 7264; 38 U.S.C. 7264(c) (applying 28 U.S.C. 455, which deals with disqualification of judges, to the Veterans Court); 38 U.S.C. 7265 (granting the Veterans Court contempt authority).

Thus, the issue exhaustion requirement invoked in the instant cases is in no way inconsistent with *Sims*.

3. Subsequent to the court of appeals' decisions in petitioners' cases, a divided panel of the Federal Circuit decided *Forshey* v. *Gober*, 226 F.3d 1299 (2000), which is in some tension with the decision in these cases. Although the Veterans Court decision did not even mention the specific statutory provision (38 U.S.C. 5107(b)) that served as the basis for Forshey's appeal to the Federal Circuit, the *Forshey* majority held that the Veterans Court had "implicitly relied" on the provision in its decision. 226 F.3d at 1302. Judge Schall dissented from this holding, arguing that the majority's notion of "relied on" would "give this court jurisdiction over arguments challenging the validity or interpretation of any statute or regulation mentioned in a CAVC opinion or inherent to a CAVC decision, regardless of whether the arguments were presented to or considered by the CAVC." *Id.* at 1307. The government agreed that this expansive concept of when the Veterans Court had in fact "relied on" a statute was inconsistent with 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) and the Federal

Circuit's prior application of that jurisdictional limitation, and thus has petitioned for rehearing in *Forshey* and suggested that the court of appeals review that decision *en banc*. The court of appeals has requested a reply to the petition.

The holding that the Veterans Court had "implicitly relied" on the statute was sufficient to satisfy 38 U.S.C. 7292(a), which requires *either* that the Veterans Court considered a statute *or* that the claimant raised the statute. 00-739 Pet. App. 4. The *Forshey* majority proceeded to address whether the court should nonetheless refrain from hearing the argument because Forshey had not raised the argument below. 226 F.3d at 1302-1303. In determining whether the Federal Circuit should impose an issue exhaustion requirement independent of 38 U.S.C. 7292, the court looked to *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000). 226 F.3d at 1303. The majority stated that *Sims* v. *Apfel* applied with "equal, if not greater, force" in the veterans benefits context because the veterans benefit system is "intended to be 'a nonadversarial, ex parte, paternalistic system,' that is 'uniquely pro-claimant.'" *Ibid.* (quoting *Collaro* v. *West*, 136 F.3d 1304, 1309-1310 (Fed. Cir. 1988)). The *Forshey* majority recognized that *Belcher* had distinguished *Sims* (in the context of 38 U.S.C. 7292) on the ground that *Sims* involved "court review of agency decisions" (00-739 Pet. App. 5) as opposed to review of court decisions, but disagreed with that distinction on the ground that "the Veterans Court is not a fact finding body like a district court, and the administrative decision of the board, to the extent we are concerned, passes through the Veterans Court as a matter of law." 136 F.3d at 1302 n.3. In the petition for rehearing and rehearing *en banc*, the government did not argue for an independent issue exhaustion requirement in addition

to 38 U.S.C. 7292(a). The government did note, however, that *Forshey*'s discussion of *Sims* is inconsistent with *Belcher* regarding the nature of Veterans Court proceedings, and urged the Federal Circuit to resolve this inconsistency.

The decision in *Forshey* does not compel review of the *Smith* and *Belcher* decisions by this Court. Petitioners do not contend that the Veterans Court "implicitly relied" on the statute and regulation that formed the bases for their appeals to the Federal Circuit. Rather, petitioners argue that 38 U.S.C. 7292 does not impose an issue exhaustion requirement (00-739 Pet. 13-14; 00-754 Pet. 13-14), or, if it does, such a requirement is no longer valid in light of *Sims* v. *Apfel* (00-739 Pet. 6-12; 00-754 Pet. 6- 12). As discussed above, *Forshey*'s discussion of *Sims* does not address the validity of issue exhaustion in the context of 38 U.S.C. 7292, but instead addresses whether the Federal Circuit could impose an issue exhaustion requirement even if the Veterans Court had "relied on" a statute or regulation and thus satisfied 38 U.S.C. 7292. To the extent *Forshey* and the instant cases are in tension with respect to the application of *Sims* in the veterans benefit area, it "is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). And, regardless of developments in the Federal Circuit, it remains the case that the Federal Circuit's dismissal of petitioners' appeals does not contradict any decision of this Court. *Sims* v. *Apfel* emphasized that it does not call into question either statutory issue exhaustion or issue exhaustion which arises in the context of appellate review of lower court decisions. See 120 S. Ct. at 2084-2085.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

DAVID M. COHEN
ANTHONY J. STEINMEYER
MARTIN F. HOCKEY, JR.
Attorneys

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